BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION OF COURTS BELOW.

R. 49, par. 8, 67, par. (fol. 71). Opinion 12,934.

Jurisdiction.

Jurisdiction is invoked under Section 240 of the Judicial Code (28 U. S. C. A. 347a).

Petitioner claims that he has been deprived of his rights existing under Article VI, Constitution of the United States, and Laws of the United States, i. e., Railway Labor Act of 1934, and Judiciary Act, Sec. 24(8), 28 U. S. Code, Sec. 41(8), U. S. C. A., Title 28, Sec. 41(8).

The asserted federal right has been denied and the sufficiency of the grounds of denial are for this Court to decide.

Tunstall v. Brotherhood of L. F. No. 76, et al., 323 U. S. ——, 65 S. Ct. 237, par. 3, i. e.

We hold, as in the Steel case, that the bill of complaint states a cause of action entitling plaintiff to relief, non-federal ground, reversed.

Statement of Facts.

R. 3, par. 3. Plaintiff was employed by the defendant on August 1, 1899, at the age of sixteen years, remained continuously in the service of defendant until October 5, 1932, when plaintiff was dismissed upon a trumpedup charge, that was supposed to have happened in McCook, Nebraska, division headquarters of the defendant, on the evening of September 9, 1932, while plaintiff was off duty, and one hour and fifteen minutes late to work the morning of September 10, 1932. During that period of thirty-three years, two months and five days, plaintiff had no entries upon his service record, as to demerit marks, or otherwise, in other words a clear record for over thirty-three years. The carrier, defendant, nor their business was in no way inconvenienced by the hour and 15 minutes delay, an assistant was in charge and he was capable to handle all work at the station.

Plaintiff was denied a hearing or a transcript of the

evidence, if any was taken, as provided by Rule 30, A. to G. R. 12, Exhibit "B".

See R. 3, par 3. The Order of Railroad Telegraphers, which is an association of defendant's employees. There are twenty divisions on the defendant's line of railroad, there is a local labor representative on each division known as the Local Chairman. The Local Chairmen draw no salary from the Labor Organization, but are employees of the defendant and their only means of support is from that source. Each three years the twenty local chairmen select a general chairman and a general secretary from among their twenty local chairmen; their terms are for three years, unless they are reelected; at the end of the three-year term they return to their former position as employees of the defendant. The General Chairman draws a salary, the same as the General Secretary, from the Labor Organization; the General Chairman's duties are to assist the local chairmen in settling disputes, etc.; the general secretary collects the dues. Their salaries are from $350.00 to $500.00 per month. Should they fail to settle disputes in accordance with defendant's desires and instructions, they of course would not return to their former position as an employee of defendant. The above has been in force since February, 1907, since petitioner has been a member.

The Supreme Court ruled in National L. R. Board v. Pennsylvania G. Lines, 303 U. S. 261 and 272, that a "Company Union" was a bar to true collective bargaining.

SPECIFICATION OF POINTS TO BE RELIED UPON AND TO BE URGED BY PETITIONER.

The petitioner contends:

1. That the Kansas judgment is void and should be set aside and held for naught.

2. The Railway Labor Act as amended June 21, 1934, covers all cases pending and unadjusted. Petitioner's claim should be adjusted as provided by the Act, and petitioner's Labor Agreement with defendant, or damages allowed as per petitioner's prayer.

3. R. 2, par. 1, Jurisdiction of Court, and R. 48, Fol. 49, Conclusions of Law.

If petitioner was denied the right to try his case under the jurisdiction shown it should have been dismissed for want of jurisdiction. Petitioner had no case under state law. See Pirie v. Tvedt, 115 U. S. 43, i. e. Plaintiff may try his case in his own way to a final determination.

4. R. 48 p, 4. Refers to Award of the Third Division, i. e. See R. 27, Exhibit "F", par. 8(c). The merits, therefore, are not open to consideration, and R. 28, par. 8, d, That the Board is without jurisdiction. Claim dismissed. The Referee recognizes that petitioner is an employee within the meaning of the Railway Labor Act of 1934; this entitles petitioner to the benefits thereunder.

Referee Swacker's decision conflicts with Federal Rule 41(b), i. e., last sentence. Dismissal for lack of jurisdiction is not an adjudication on the merits. Therefore cannot be pleaded as a bar in any case by court or Board.

5. R. 45, par. 7. A judgment for plaintiff in the sum of $500 was entered in favor of and with the consent of plaintiff on a general verdict of the jury and special questions submitted to the jury wherein the jury allowed the sum of $500.00 to plaintiff as damages for loss of plaintiff's seniority rights.

a. The above is an erroneous statement, and not the facts in the case. See R. 21, par. 2, Exhibit "E", i. e. And afterwards, to-wit, on this eleventh day of February, 1937, the same being one of the days of said term of said court, said Judge presiding, and the plaintiff being present in person, and the defendant being present by its attorneys as aforesaid, on its motion for a new trial and also its motion for judgment for defendant on the special questions and answers thereto, which motions were filed herein on October 17, 1936, and both of said motions being withdrawn, being asked by the Court the plaintiff personally stated in open court that he had no objections to the entry of judgment on said verdict. Due to the fact that respondent failed to sustain his charges in the suit, petitioner was of the opinion he would be reinstated. See Par. F, R. 12, Exhibit "B".

b. The fact that the special questions were withdrawn on the 11th of February, 1936, the entry of judgment was on the general verdict. The special questions were not consistent with the general verdict, otherwise, there would have been no such motion filed as stated above, which "motions were filed herein on October 17, 1936". Had the questions and answers been consistent with the general verdict no such motion would have been necessary. No judgment whatever was rendered upon the special questions.

c. See R. 15, par. 8, of Exhibit "C", i. e., last sentence, i. e. That he was earning an average wage of about $200.00 per month each year and has sustained loss of wages and earnings in about the sum of $3,000.00 by reason of the wrongful acts and breach of contract by and on the part of the said defendant.

d. Nothing is said about suing for future damages in the petition, from October 5, 1932, to January 25, 1934, almost sixteen months, at $200.00 per month, would be a trifle over three thousand dollars. See R. 15, par. 8, of petitioner's Amended Complaint, and,

6. R. 43, par. 1. Finding of Facts. Petitioner was employed at five stations in Colorado, five in Nebraska and five in Kansas during his railroad career with defendant. Petitioner was at Oberlin, Kansas, from October 30, 1914, until October 5, 1932. Any statement by respondent to the contrary is erroneous. R. 44, par 3. Contract signed October, 1927. This contract agreement superseded another contract of practically the same terms, and there had been a contract agreement since February, 1907, in full effect and force. R. 46, par 10, is answered in paragraph 5 (a) and (b) above. There is no selection of remedies.

(a) Under the Railway Labor Act of 1934, Congress provided the remedy, Sec. 3p of the Act. See Kalb v. Feuerstein, 308 U. S. ——, 60 S. Ct. 364, par. 10. Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to a Commission who might be laymen, and consideration as to

jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress has been exercised as in this Act.

(b) The plenary power was likewise exercised under the Railway Labor Act of 1934, but a "Dominated Union" working under instructions of his employer usually set it aside if it interferes with their ideas, or in any way obstructs what they desire to accomplish.

(c) R. 47, par. 12. The defendant was not a party in any way, etc. (last sentence 48, par. 12). Respondent has representation on the Third Division of the Adjustment Board. Any action started against that division, of course respondent is a party by the representation they have on the board.

(d) The hearing in the District Court of the United States was of five hours' duration, and plaintiff Howard was the only witness. The evidence presented fell far short of sustaining the finding of facts and conclusions of law, including the documentary evidence presented. R. 48 (fol. 49), and R. 43 (fol. 44). Motion to that effect was filed by plaintiff, which was overruled by the court.

(e) R. 9, par. 16. Last sentence, i. e. Plaintiff has at no time agreed to a rescission of the contract. Petitioner's contract is a part of the Railway Labor Act of 1934, and as long as petitioner pays his dues it is a continuous contract, and petitioner holds his employment status during a labor dispute. See American Mfg. Co. v. National L. R. Board, 309 U. S. 629; N. L. R. B. v. Good Coal Co., 110 F. (2d) 501, 6th Cir.

R. 37, par. (fol. 38-38A).

7. R. 25 (fol. 25). Award 606, Adjustment Board. Defendant filed May 23, 1944, what was supposed to be the certified record as filed before the Board. There was no opportunity to examine or check the contents, consisting of about 75 to 100 pages. On examination in the Clerk's office the next day, it developed 49 pages of plaintiff's reply in Award 606 had been omitted. See Treineis v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 50, par. 12, 13, i. e. Con-

clusions of a court of general jurisdiction are assailable collaterally for fraud or lack of jurisdiction.

8. R. 44, par. 4 and R. 20 "E". On October 5th, 1932, plaintiff was discharged by defendant upon the grounds that he had violated the defendant's rule, etc. See United States v. Moser, 266 U. S. 236, 242, 45 S. Ct. 66, 67, i. e.

But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action. Reed v. Allen, 286 U. S. 191, 201, 52 S. Ct. 532, 534, i. e.

> "* * * a judgment not set aside on appeal or otherwise is equally effective as an estoppel upon the points decided, whether the judgment be right or wrong."

9. System Fed. No. 59 v. Louisiana R. Co., 119 F. (2d) 509 (5c), par. 5, decided May 12, 1941, i. e.

While collective bargaining agreement provided that no employee should be dismissed or suspended without sufficient cause, and that restitution should be made when action had been taken contrary to the contract was in force, employees coming under it had their tenure and rights governed by its terms, and for action taken contrary thereto they had a right of action to redress their grievances.

ARGUMENT.

An analysis and appraisal of the procedure under the Railway Labor Act as amended June 21, 1934, and the National Labor Relations Act, should be approached through some initial consideration of the purpose of the Acts and their substantive provisions. Procedure of a federal administrative or quasi-judicial agency is a method provided by Congress for the carrying out of a public policy decided upon by Congress. The Congressional policy is set forth as follows. It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation

of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. Employees have as clear a right to organize and select their representatives for lawful purposes as the employer has to organize its business and select its officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.

The substantive provisions of the statute prevent practices such as the discriminatory discharge, the company dominated union, the threat of loss of employment for union activity, espionage, et cetera (practices termed by Congress as "unfair labor practices"), and found by Congress, on the basis of experience, so well known, that the Supreme Court said it was a matter of judicial notice to undermine and destroy the right of collective bargaining (301 U. S. 1.).

CONCLUSION.

While the Kansas court did not have jurisdiction on October 15-16, 1936, when the case was tried, due to the fact that the defendant was unable to sustain the charges brought against the plaintiff, plaintiff should have been reinstated at that time, due to the fact he had been denied a hearing as provided by Rule 30(A) of the Agreement. Paragraph F of Rule 30 mades such a provision. R. 14(F).

Petitioner asks that a writ of certiorari be granted and that upon final hearing the judgments of the lower courts be reversed.

Respectfully submitted,

G. F. Howard, *Petitioner.*

Oberlin, Kans., March 10, 1945.